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MICHAEL ROBAK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1434

JAMES CARY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF THE STATE OF FLORIDA
FIRST DISTRICT

BRIEF FOR THE PETITIONER JAMES CARY

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No.

JAMES CARY,

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v.

STATE OF FLORIDA,

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PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF THE STATE OF FLORIDA
FIRST DISTRICT

BRIEF FOR THE PETITIONER JAMES CARY

Petitioner, JAMES THOMAS CARY, prays that a Writ of Certiorari be issued to review the judgment of the Appellate Court of the State of Florida, First District, entered in the above captioned case on October 26, 1972, Petition for Rehearing denied December 13, 1972.

OPINION BELOW

The Trial Court, the Felony Court of Record for Volusia County, State of Florida, entered a judgment on the 6th day of January, A.D., 1971, printed herein at Page 1, Appendix A, adjudging the Petitioner guilty of

attempted manslaughter. The Appellate Court of the State of Florida, First District, rendered its judgment affirming the Trial Court, without opinion, on October 26, 1972, which is printed herein at Page 1, Appendix B. (Not reported)

Upon Petition for Rehearing, the Appellate Court of Florida, First District, entered an Order denying the same on December 13, 1972.

On December 27, 1972, the Petitioner filed his Writ of Certiorari in the Supreme Court of the State of Florida. The Supreme Court of Florida, on December 5, 1973, entered its Order denying the Petition for Writ of Certiorari, which Order is printed herein at Page 1, Appendix C. (Not reported)

That thereafter on the 19th day of December, A.D., 1973, the Petitioner filed his Petition for Rehearing or in the Alternative to Stay the Mandate and fix bail pending application to the United States Supreme Court for Writ of Certiorari.

The Supreme Court of Florida did on January 31, 1974, deny the Petition for Rehearing but granted a stay to and including April 1, 1974, to enable Petitioner to seek review in the Supreme Court of the United States, which Order is printed herein at Pages 1 and 2, Appendix D.

STATEMENT OF JURISDICTION

The Appellate Court of the State of Florida, First District, entered its opinion affirming the judgment of the trial court on October 26, 1972. A Petition for Rehearing was thereafter duly considered by the Court and denied on December 13, 1972.

The Supreme Court of Florida entered its Order that "It is without jurisdiction." and denied Petitioner's Petition for Writ of Certiorari on December 5, 1973. The

Supreme Court of Florida further denied the Petition for Rehearing on January 31, 1974, so that said decision is a judgment of last resort in the State of Florida. This Petition for Certiorari is filed within 90 days of the decision of the Court affirming the judgment of the Trial Court.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

The Federal Question raised in this Appeal is:

POINT I

Whether Jury Instructions, which fail to define "culpable negligence" in a manslaughter prosecution, where the Jury requests the Court to explain the difference between manslaughter, attempted manslaughter, and assault and battery, satisfies the requirements of the Fifth and Fourteenth Amendments.

CONSTITUTIONAL PROVISION INVOLVED

U. S. Constitution, Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution, Amendment Fourteen

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner was originally charged with manslaughter. He was convicted of attempted manslaughter in the Felony Court of Record in Volusia County, Florida. (App. 168) Petitioner's Motion for New Trial or in the Alternative in Arrest of Judgment, was denied. (App. 170)

A brief chronology of the events leading to his conviction is as follows:

This was a bar room fist fight. No weapons were used.

The deceased, Robert Griswald was 6 foot tall and weighed 190 lbs. and at the time of his death, according to the County Medical Examiner, "was drunk." (App. 43)

The Petitioner and two friends, Napoleon David Lucero, and Thomas Joseph Strange, entered the Music Bar in Daytona Beach, Volusia County, Florida, on the evening of August 4, 1969, for "one more beer." (App. 90) They had been drinking quite a bit at a number of different bars. (App. 90) The Petitioner admitted he was "happy drunk" at the time. (App. 91)

In the bar, seated at bar stools, were two ladies, Thelma Delores Causey, the deceased's date, and Edna Myers, the date of one James Rainey. (App. 58)

At the time Petitioner and his friends entered the bar, Griswald and Rainey were shooting pool. Petitioner occupied a stool next to one of the ladies. At this point, Rainey approached Petitioner and advised him that he was seated in front of his drink. (App. 92) When the Petitioner didn't move, a fist fight broke out between Rainey and Petitioner. (App. 93)

Griswald joined into the fight, as well as Lucero. Strange attempted to stop the fight which was over in less than a minute. (App. 92)

When Griswald hit Lucero, according to Petitioner's version, he, Petitioner, hit Griswald "very, very hard" with his fist. (App. 95) Griswald fell back against and across the pool table, and when Petitioner tried to pull him off the table, Griswald fell to the floor. (App. 94) The County Medical Examiner testified that death was due to a blow to the occiput or back of the head. He also stated that the deceased had a laceration over the left eyebrow but this did not have any direct relationship to the cause of death. (App. 37)

After the taking of testimony, and at the conference called by the Court for the purpose of preparing the charges to be given to the Jury, the Trial Judge advised counsel for the State and Defendant that he would give the "general charges" that he gave Juries on trials of this nature. (App. 137)

The Judge further advised that he would give the Jury the lesser and included offenses of assult with intent to commit a felony, to-wit: manslaughter, attempted manslaughter, assault and battery, and assault. (App. 138)

The Judge failed to define the term "culpable negligence."

Counsel for the Defendant did not object.

After the Jury retired and began their deliberation, they returned to the courtroom and asked the Judge to

explain the difference between manslaughter, attempted manslaughter, and assault and battery. (App. 163-165)

The Court again failed to define the term "culpable negligence."

Counsel for the Defendant did not object, and waived the reading of any further instructions unless the Jury requested it. (App. 166)

The Jury returned a verdict of "guilt of attempted manslaughter." (App. 167)

Petitioner was sentenced to a term of two years to the custody of the Division of Correction of the State of Florida. (App. 172)

SUMMARY OF ARGUMENT

The failure of the Trial Judge to define the term "culpable negligence" the essential element to the crime of manslaughter, violated Petitioner's constitutional rights under the due process clause of the Fifth and Fourteenth Amendments because such term is not in the common speach of man and fails to clearly and accurately charge the Jury on the essential Rule of Law applicable to the facts of the case so that the verdict of attempted manslaughter did not conform to the Rule of Law.

First, the crime of manslaughter, as charged in this case, could only have been committed by the Defendant through an act of "culpable negligence," under Florida Law. (See *Rivers v. State*, 75 Fla. 401, 78 So. 343; *Gainer v. State*, 100 Fla. 164, 129 So. 576; *Roddenberry v. State*, 152 Fla. 197, 11 So. 2d 582.)

The definition of the term "culpable negligence" as defined by the Florida Supreme Court, means negligence of a gross and flagrant character, envincing a reckless disregard of human life, or of the safety of persons

exposed to its dangerous effects, or that entire want of care which would raise the presumption of indifference to consequences; or shows such wantonness or reckless or grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the right of other, which is equivalent to an intentional violation of them. (See *Cannon v. State*, 91 Fla. 214, 107 So. 360; *Pills v. State*, 132 Fla. 812, 182 So. 234; *Walter v. State*, 157 Fla. 684, 26 So. 2d 821; *Cornell v. State*, 159 Fla. 687, 32 So. 2d 610; *Russ v. State*, 140 Fla. 217, 191 So. 296.)

Intent to kill is not an essential element of manslaughter since culpable negligence has supplanted intent. (See *Hulst v. State*, 123 Fla. 315, 166 So. 828; *Walter v. State*, 157 Fla. 684, 26 So. 2d 821.)

The failure to define the complex meaning of the term "culpable negligence" by the Court is the failure to give an instruction essential to a correct understanding by the jury of the case. (See *Thompson v. U.S.*, 272 F.2d 919, Fifth Circuit, 1959; *Bollenback v. U.S.*, 326 U.S. 606, Supreme Court, 1946.)

This misdirection to the Jury cannot be said to be "technical" or one which does not "affect the substantial rights of the parties."

Since the adoption of the manslaughter statute by the Legislature of the State of Florida, where "culpable negligence" became the standard for measuring criminal responsibility, the Supreme Court of Florida, and the various Appellate Courts have been unable to define the term in any language other than the definition set forth above.

Without an appropriate legal yardstick to guide the Jury in measuring the evidence is to put constitutional guarantees of due process in the hands of fact finders only and to allow each Juror to fashion his own meaning of "culpable negligence."

ARGUMENT

THE FAILURE TO PROVIDE THE JURY WITH ANY DEFINITION OF THE TERM "CULPABLE NEGLIGENCE" IN MANSLAUGHTER PROSECUTION DID NOT SATISFY THE FIFTH AND FOURTEENTH AMENDMENTS.

The failure of the trial Judge to exercise his inescapable duty to charge the jury on the Rule of Law as to the Essestion Element of "culpable negligence" in a manslaughter prosecution violates the Fifth and Fourteenth Amendments for two reasons:

First, the Trial Judge has an inescapable duty to guide and assist the Jury toward an intelligent understanding of the legal issues. (See *Elbel v. U.S.* 364 F.2d 127, 1966) This duty is not fulfilled by mere abstract statements of legislatively created definitions which do not have a commonly understood meaning, and fails to satisfy the common law duty of the Trial Judge to instruct the Jury upon matters of law emerging upon the evidence. *(Hale, The History of the Common Law of England,* pages 164 and 165.)

Secondly, the proper conduct of the trial cannot be assured sufficient to establish due process safe guards where the Jury is left to its own understanding of undefined legal terms such as "culpable negligence" where the Jury asks for but does not receive guidance from the Court as to the difference between manslaughter, attempted manslaughter, and assault and battery. (See *Bollenbach v. U.S.* 326 U.S. 606, 1946; *Mullaney v. Wilbur,* CA1, 14 Cr.L. 4151, *473* F.2d *943; U.S. v. Escamilla,* CA, 11 Cr.L. 2516, *467* F.2d *341.*)

Jury Instructions meet due process standards under the Fifth and Fourteenth Amendments only if they *clearly and accurately* state the Rules of Law by which the Jury

is to be guided in its deliberations. (See *U.S. v. Grunewald*, 233 F.2d 556, 2d CA, 1956.) If by reason of the failure to clearly and accurately state the essential elements of the crime for which an accused is being prosecuted, the Jury becomes confused, the resulting prejudice is not technical but fundamental and prejudicial. *Robles v. State*, 188 So. 2d 789, Supreme Court of Florida, 1966; *Canada v. State*, 139 So. 2d 173; *Matley v. State*, 20 So. 2d 798; *Croft v. State*, 158 So. 2d 454, 32 Fla. Jur. "Trial" Sec. 186.)

Bollenbach v. U.S., supra, governs this case. Even though in Bollenbach, the Judge misguided the Jury with an erroneous "presumption of guilt" instruction given as a guide and in the instant case the Judge failed to guide the Jury as to an essential element of the crime, the distinction is constitutionally irrelevant. As Holmes stated in Bollenbach, "A charge should not be misleading." (See *Agnew v. U.S.*, 165 U.S. 36, 41 L.Ed. 624, 17 S. Ct. 235.)

Standards by which guilt is determined in our Court, which go to protecting fundamental safeguards of due process, are never technical. These are in the "fundamental criteria" class. Failure to fulfill the duty imposed by law upon the Trial Judge to clearly and accurately define the Rule of Law under which Defendant is being tried where the Jury expresses any doubt as to its meaning, is a lack of due process. (See Mullaney v. Wilbur, supra.)

CONCLUSION

The judgment of the Appellate Court, First District of Florida, should be reversed for the foregoing reasons.

Respectfully submitted,

DAN R. WARREN, Esquire
Judge and Warren
Post Office Box 2265
Daytona Beach, Florida 23015
Attorney for Petitioner

APPENDIX A

On January 6, 1971 there was filed in the office of the Clerk of the Felony Court of Record, Volusia County, Florida and recorded in Felony Court of Record Minute Book 6, at Page 74, an Order, in the words and figures following:

ORDER

State of Florida
v.
Napoleon David Lucero Case No. 865
and James Thomas Cary, Defendants.

The Motion for New Trial, or In the Alternative, In Arrest of Judgment, of the above named Defendants coming on to be heard before the Court on December 20, 1970, and after hearing argument of counsel for the Defendant, WILLIAM W. JUDGE, and of the State of Florida by and through Assistant State Attorney, Horace Smith, Jr., and the Court being fully advised in the premises, it is, therefore,

ORDERED AND ADJUDGED that the Defendant's Motion for New Trial, or, In the Alternative, In arrest of Judgment be, and the same is hereby denied.

DONE AND ORDERED in Open Court at DeLand, Volusia County, Florida, this 6th day of January, A.D. 1971.

/s/ Uriel Blount, Jr.
Judge, Felony Court of Record
(Tr.-231)

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JULY TERM, A. D. 1972

JAMES THOMAS CARY,	)	NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.
Appellant,	)	
vs.	)	
STATE OF FLORIDA,	)	CASE NO. 0-381
Appellee,	)	

Opinion filed October 26, 1972.

An Appeal from the Felony Court of Record for Volusia County. Uriel Blount, Jr., Judge.

Dan R. Warren, of Judge, Warren & Cass, for Appellant.

Robert L. Shevin, Attorney General; and Richard W. Prospect, Assistant Attorney General, for Appellee.

PER CURIAM.

This cause having been orally argued before the Court, the briefs and record on appeal having been read and given full consideration, and the appellant having failed to demonstrate reversible error, the judgment of the lower court appealed from herein is affirmed.

SPECTOR, CHIEF JUDGE, CARROLL, DONALD and RAWLS, JJ., CONCUR.

APPENDIX C

SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1973

WEDNESDAY, DECEMBER 5, [20th]1973

JAMES THOMAS CARY, Petitioner,	)	
vs.	)	CASE NO. 43,191
STATE OF FLORIDA, Respondent.	)	DISTRICT COURT OF APPEAL, FIRST DISTRICT
	)	0-381

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c

(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, C.J., ROBERTS, ERVIN, ADKINS and BOYD, JJ., concur

A True Copy

TEST:

/s/ Sid J. White
Clerk Supreme Court.

C
CC: Hon. Raymond E. Rhodes, Clerk
Hon. V. Y. Smith, Clerk
Hon. Uriel Blount, Judge

Hon. Joseph Garlovsky
of Judge, Warren, Cass
and Garlovsky
Hon. Robert L. Shevin
and Hon. Richard W. Prospect

RECEIVED, Date 12-10-73, D.R.W. 12-12-73, R.M.C. J.G. 12-10-73, M.C.T. J.S.

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1974

THURSDAY, JANUARY 31, 1974

JAMES THOMAS CARY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 43,191
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

On consideration of the petition for rehearing filed by counsel for petitioner,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

CARLTON, C.J., ROBERTS, ERVIN, ADKINS and BOYD, JJ., concur

A True Copy

TEST:

/s/ Sid J. White
Clerk Supreme Court.

Y
CC: Judge, Warren, Cass & Garlovsky (Hon. Joseph (Hon. Joseph Garlovsky)
Hon. Richard W. Prospect
Hon. Raymond E. Rhodes, Clerk
Hon. V. Y. Smith, Clerk
Hon. Uriel Blount, Judge

Received, Date 2-4-74, D.R.W. 2-4-74, R.M.C. ____, J.G. ____, M.C.T.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1974

THURSDAY, JANUARY 31, 1974

JAMES THOMAS CARY,	)	
	)	
Petitioner,	)	
	)	
	)	CASE NO. 43,191
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

Petitioner has filed motion for stay and upon consideration thereof said motion is granted and proceedings in this Court are stayed and further proceedings in the First District Court of Appeal and in the Circuit Court in and for Volusia County, Florida are hereby stayed to and including April 1, 1974 to enable petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that court, and it is further

ORDERED that this stay be subject to the posting of

an appeal bond in an amount and on conditions to be fixed by Circuit Judge Uriel Blount, Jr., DeLand, Florida.

CARLTON, C.J., ROBERTS, ERVIN, ADKINS and BOYD, JJ., concur

A True Copy

TEST:

/s/ Sid J. White
Clerk Supreme Court.

Y
CC: Judge, Warren, Cass & Garlovsky
(Hon. Joseph Garlovsky)
Hon. Richard W. Prospect
Hon. Raymond E. Rhodes, Clerk
Hon. V.Y. Smith, Clerk
Hon. Uriel Blount, Jr., Judge